UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAUL L. MICHAUD,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-249-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the questions whether there is substantial evidence in the record to support the commissioner's decision that the plaintiff's disability was not severe and whether the commissioner was required to consult a medical advisor in order to determine the date of onset of the plaintiff's disability. I recommend that the court affirm the decision of the commissioner.

In accordance with the commissioner's sequential review process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 17, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on August 30, 1980, the date upon which he stated he became unable to work, and has acquired sufficient quarters of coverage to remain insured only through September 30, 1981, Finding 1, Record p. 17; that he suffered from post traumatic stress disorder ("PTSD") on September 30, 1981, Finding 3, Record p. 18; that his statements concerning his disorder and its impact on his ability to work on September 30, 1981 were not entirely credible in light of the medical history in the record, Finding 4, Record p. 18; that there were no objective medical reports to support a finding that he suffered from any disability on September 30, 1981 that significantly limited his ability to perform basic work-related functions and that he accordingly did not have a severe impairment as defined by the applicable regulations at that time, Finding 5, Record p. 18; that his drug addiction was not a contributing factor material to the determination of disability, Finding 7, Record p. 18; and that he was not disabled, as defined in the Social Security Act, at any time through September 30, 1981, Finding 6, Record p. 18. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 523 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The commissioner in this case reached Step 2 of the sequential evaluation process, at which

stage the claimant bears the burden of demonstrating that he had a severe impairment or combination of impairments that significantly limited his ability to do basic work activities at the relevant time. 20 C.F.R. § 404.1520(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). The burden at Step 2 is *de minimis*, "designed to do no more than screen out groundless claims." *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). Therefore, when a claimant produces evidence of an impairment or combination of impairments, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. (quoting Social Security Ruling 85-28).

Social Security Ruling 83-20 instructs that

> [i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 50. The date alleged by the claimant should be used "if it is consistent with all the evidence available." *Id*. at 51. "[T]he established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record." *Id*. According to SSR 83-20, "it may be possible," but only "[i]n some cases," for the administrative law judge to use the medical evidence of record "to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination." *Id*. Such a determination "must have a legitimate medical basis;" it is necessary to call on the services of a medical advisor in such

circumstances. *Id*.

SSR 83-20 also contemplates the possibility that the available medical evidence will not yield a reasonable inference about the progression of a claimant's impairment. *Id*. In such a case, "it may be necessary to explore other sources of documentation" such as information from family members, friends and former employers of the claimant. *Id*. "The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record." *Id*. at 52.

Here, the plaintiff's PTSD was not diagnosed until August 1996. Record at 134. The administrative law judge found that the only evidence of impairment caused by PTSD as of September 30, 1981 was the plaintiff's own reports of symptoms, "unsupported by objective medical signs or laboratory test results coincidental with the alleged symptoms." *Id*. at 17. This, he concluded, was insufficient to establish the existence of a severe impairment in 1981. *Id.*

The plaintiff relies on the testimony of Robert Daisey, a licensed clinical social worker who had been counseling veterans since 1986. *Id*. at 27. Daisey testified that the plaintiff "has been dealing with PTSD since Vietnam," *id*. at 28, where he served for some period of time between 1968 and 1971, *id*. at 75. Daisey also testified that the plaintiff's "first real problems . . . started to come up . . . after Vietnam," that the plaintiff worked for five years in a paper mill after his return from military service, that the plaintiff quit this job because he had difficulty getting along with his supervisors, that the plaintiff had a construction job for six months at some time after quitting the paper mill job where he was "starting to not be able to get along" when the project on which he was working was done, and that his testimony was based on what the plaintiff reported to him. *Id*. at 28-30. The problem with this testimony for the plaintiff is that it establishes, at most, a professional diagnosis that PTSD existed on September 30, 1981, as the administrative law judge recognized,

Record at 18, but not that the PTSD was a severe or disabling impairment as of that date. *See Flint v. Sullivan*, 951 F.2d 264, 267 (10th Cir. 1991) (retrospective diagnosis of PTSD without evidence of actual disability is insufficient). Because there was no evidentiary basis upon which the administrative law judge could have found that the plaintiff's PTSD was severe on the date last insured, there was no need for him to consult a medical advisor.

At least one court has held that retrospective medical diagnoses implying that a claimant suffered from PTSD on the date last insured, coupled with lay evidence relating to that period to the effect that the claimant's personality "was changed dramatically for the worse by his Vietnam service," when the diagnoses were not made for the purpose of evaluating a Social Security claim, must be addressed by an administrative law judge deciding a claim for disability benefits. *Jones v. Chater*, 65 F.3d 102, 103-04 (8th Cir. 1995). However, in this case the plaintiff presented Daisey's testimony for the purpose of his Social Security claim and there is no corroborating lay evidence.[2] Here, the administrative law judge did not specifically mention Daisey's testimony in his opinion, but his finding that the plaintiff "had" PTSD "on the date his insured status expired," Record at 17, finds support only in Daisey's testimony. While not as developed as it should be, the administrative law judge's analysis is sufficient, based on the evidence presented by the plaintiff, who was represented at the hearing. *See Likes v. Callahan*, 112 F.3d 189, 190-91 (5th Cir. 1997) (adopting *Jones* standard and remanding for explicit consideration of retrospective PTSD diagnosis).

The plaintiff failed to submit sufficient evidence to require the commissioner to find that his

[2] The only lay evidence other than the plaintiff's own is a written statement of Norma Baker, who identifies herself as someone who "worked w[ith] a family member 6 years prior," that the plaintiff "has [been] isolated for past 10-12 years." Record at 95-96. The form was signed on September 10, 1996, making the observation valid at the most no earlier than 1984, well after the date last insured.

PTSD was a severe impairment on September 30, 1981. Accordingly, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of November, 1999.

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David M. Cohen
United States Magistrate Judge